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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-922

DOUGLAS HOWARD, Petitioner

v.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF CALIFORNIA

Richard S. Buckley
Public Defender of Los
Angeles County, California
Harold E. Shabo
Robert T. Jacobs

Herbert M. Barish
19-513 Criminal Courts Bldg.
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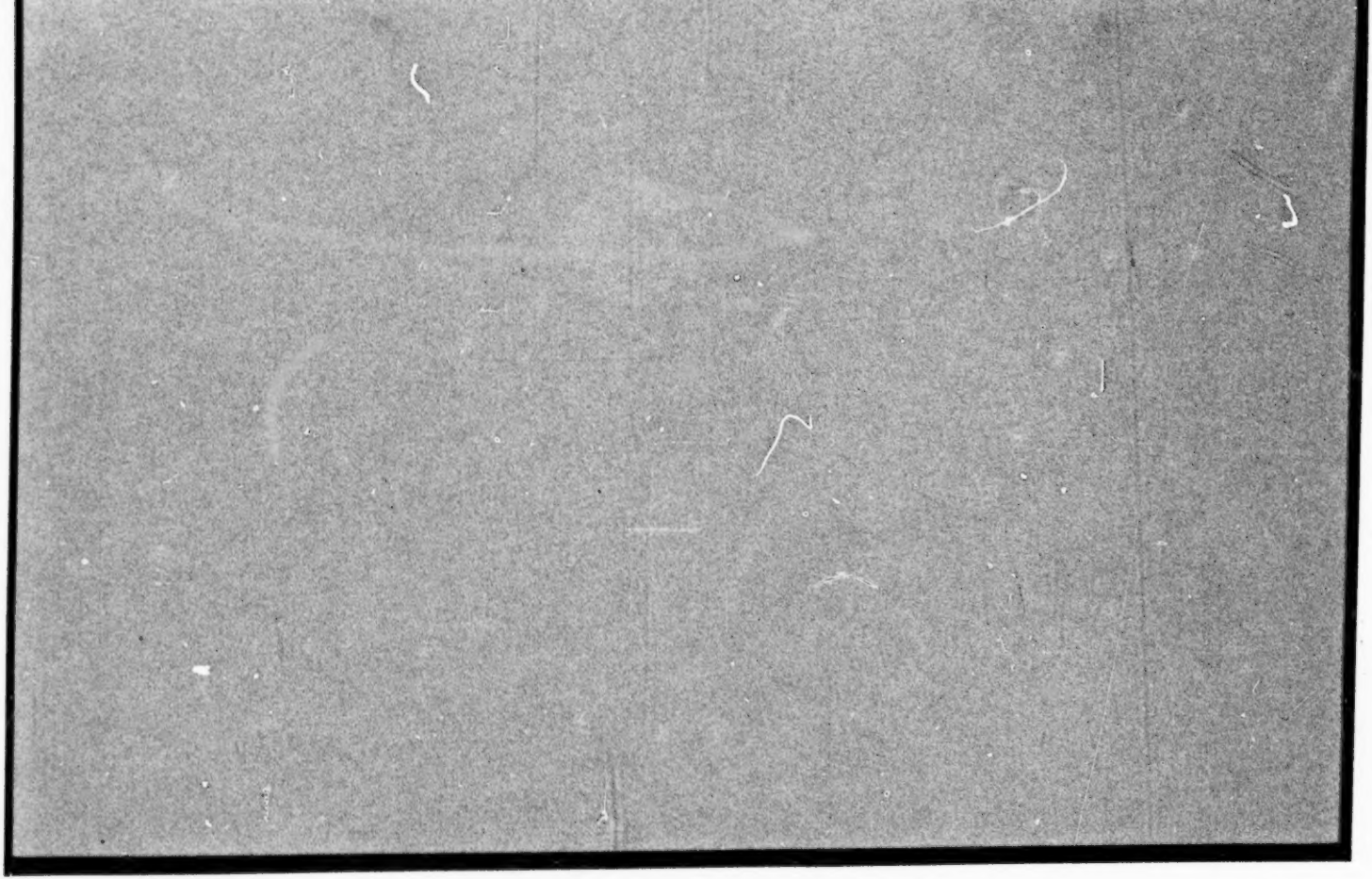

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.

DOUGLAS HOWARD, Petitioner

v.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the Second Appellate District, Division One in the above cause on September 4, 1974, printed in Appendix A.

CITATIONS TO OPINIONS BELOW

The Court of Appeal of the State of California, Second Appellate District, Division One, issued an unpublished opinion, printed in Appendix A.

JURISDICTION

The decision of the Court of Appeals was made and entered as set forth in the quoted opinion under Appendix A on September 4, 1974, and the California Supreme Court denied hearing on October 30, 1974. The jurisdiction of this court is conferred by 28 U.S.C. section 1257(3).

QUESTION PRESENTED

Does the assessment of the cost of court appointed counsel against an indigent defendant violate his right to equal protection and due process as guaranteed by the Constitution of the United States of America when:

1. The defendant was acquitted.
2. Whether or not to assess costs is left to the caprice of the judge who heard the criminal case.

3. The amount of cost is determined in an arbitrary manner by the judge who presided over the criminal trial.

4. The right to a trial by jury as to the value of legal services is denied, while the non-indigent can contest before a jury the alleged value of his attorneys' services.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the United States Constitution.

> Amendment XIV: ". . . nor shall any State deny any person of . . . property without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

The statutory provision involved is California Penal Code section 987.8.

> Penal Code section 987.8. "In any case in which a defendant is furnished counsel, either through the public defender or private counsel appointed by the court,

upon conclusion of the criminal proceedings in the trial court, the court shall make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. If the court determines that the defendant has the present ability to pay all or part of the cost, it shall order him to pay the sum to the county in any installments and manner which it believes reasonable and compatible with his financial ability. Execution may be issued on the order in the same manner as on a judgment in a civil action. The order shall not be enforced by contempt.

STATEMENT OF THE CASE PROCEDURAL FACTS

On December 14, 1972, petitioner was arraigned in Los Angeles County Superior Court, case number A 284755, charging him with two counts of 245a Penal Code (assault with a deadly weapon) both

felonies. The Public Defender was appointed, a plea of not guilty was entered. The petitioner was informed of his responsibility to pay for appointed counsel.

On June 12, 1973, trial began. On June 14, 1973, the jury returned a verdict of not guilty to both counts. The court immediately assessed fees of $500 under 987.8 Penal Code.

On June 29, 1973, a notice of appeal was filed.

On November 14, 1973, petitioner filed his opening brief, the Federal constitutional questions raised in this petition were raised in that brief.

On August 27, 1974, oral argument was conducted in the Court of Appeal. The Deputy Attorney General representing the People of the State of California, conceded that assessing costs against Mr. Howard was improper.

On September 7, 1974, the Court of Appeal rendered its decision affirming the order of assessment.

On October 15, 1974, petitioner filed for hearing in the California Supreme Court.

On October 30, 1974, hearing was denied.

STATEMENT OF FACTS

The defendant was acquitted by a jury. After thanking the jurors for their service, the Honorable Paul G. Breckenridge, Jr. made the following statement to the jury:

> "I don't really see how you could have done much else in this case, considering the fact that the girl made the statement to the police out at UCLA that was probably false, at least in part.
>
> "I thought the defendant almost let the cat out of the bag on cross-examination when he started to tell you how he could stick that shotgun under his belt and get away with it. Let's hope that he doesn't do it again.
>
> "The juors are excused.
>
> "The defendant is not excused because we are going to have a

little hearing to see how much he has to pay the County for his legal services here."

The court then conducted a hearing as follows:

"THE COURT: Mr. Howard, you are entitled to have a hearing on the matter of the determination of what is an appropriate fee and your ability to reimburse the County for the 'costs of legal services.'

"Do you work?

"THE DEFENDANT: I'm not working at the present, but I was supposed to start after the trial is over.

"THE COURT: Where are you going to work?

"THE DEFENDANT: My brother is supposed to be trying to get me a job with the bus company.

"THE COURT: What bus company?

"THE DEFENDANT: The bus company on 54th and Arlington.

"THE COURT: Mr. Jacobs, how much time do you contemplate

that you have spent in this case and your investigation department?

"Do we have one of those orders, Rosie?

"MR. JACOBS: Our investigator indicates that they spent eight hours on the matter, and I would say that in addition to the trial time, I have spent three hours.

"THE COURT: All right. Well, I am going to find the defendant has the present ability to reimburse the County for the costs of legal services provided to him, and the Court feels that the costs are greatly in excess of $500, but I am going to fix $500 as the amount that the defendant is obligated to reimburse the County for the costs of legal services, and he can pay it off at $25 a month or more. The first payment will be August the 1st --

"MR. JACOBS: Excuse me, Your Honor.

"THE COURT: -- 1973.

"MR. JACOBS: Excuse me. Mr. Howard has asked -- I'm not sure where I fit in this particular situation. Mr. Howard has asked me to ask the Court if there is any sort of indication of how he can pay --

"THE COURT: He can get a job. It's about time he get off the dime and get a job.

"MR. JACOBS: At the present time he does not have one. He hopes to get one, but he doesn't have one at this time.

"THE COURT: I am giving him until August the 1st to raise $25. That's no big deal.

"All right. Pursuant to the appropriate section of the Penal Code, it is the order of this Court that Douglas Howard is ordered to pay the County of Los Angeles the sum of $500 for payment of services of appointed counsel, payable as follows:

"$25 per month or more, commencing on August 1st, 1973, and each succeeding 1st of each month thereafter until the entire sum shall be paid in full;

"Payments to be made to the Bureau of Resources and Collections, 155 West Washington Boulevard, Los Angeles.

"The defendant is present. He will be personally served with a copy of this order. He is to remain in courtroom until such time as he is excused by the clerk.

"That's all."

ARGUMENT

I. ASSESSING COSTS AGAINST AN ACQUITTED DEFENDANT DENIES DUE PROCESS OF LAW.

Petitioner contends that the process of the State extracting funds from an individual merely because he is charged with a crime constitutes a denial of due process of law. Enforcement of Penal Code section 987.8 results in the

taking of property (in the form of money) from indigents merely because they have been charged with a crime, regardless of guilt or innocence. If the power to tax involves the power to destroy, M'Culloch v. Maryland, 4 Wheat 316; certainly the power to levy costs involves both the power to destroy and the power to punish. Acquitted individuals such as the petitioner are, in effect, being punished for having been charged with a criminal offense. The presumption of innocence and the requirement that the state prove guilt prior to punishment being imposed is, thereby, abrogated.

> "In my opinion, the Due Process Clause of the Fourteenth Amendment does not permit a State to impose a penalty or costs upon a defendant whom the jury has found not guilty of any offense with which he has been charged." Giaccio v. State of Pennsylvania, 382 U.S. 399, 405; 15 L.Ed.2d 447, 452; 86 S.Ct.518, 522 (1966), (concurring opinion of Justice Fortas).

II. PETITIONER WAS NOT PROVIDED MINIMAL PROCEDURAL DUE PROCESS.

Minimal procedural due process requirements, such as expressed in Goldberg v. Kelly, 397 U.S.254, 25 L.Ed. 2d 287, 90 S.Ct.1011 (1970), were not provided petitioner.

The petitioner was not given timely and adequate notice as to what was to be presented at the hearing. The record indicates that the first information petitioner had as to what was to be presented at the "hearing," was what occurred at the proceeding itself.

There was no opportunity to examine witnesses.

Legal rules of evidence were not followed.

The judge did not state the reason for his determinations.

The judge did not indicate what evidence he relied upon to make his determinations.

The judge was clearly not an impartial decision maker. Firstly, the judge's income and conditions of work are affected by the governmental unit for

whom he is collecting funds and; secondly, in this case, the judge who heard the criminal action apparently believed the defendant was guilty of the charge despite the jury verdict. He stated to the jury, "I thought the defendant almost let the cat out of the bag on cross-examination . . . let's hope he doesn't do it again" (emphasis added). Such a statement clearly indicates a belief the defendant was getting off with committing a crime. The judge further stated, ". . . we're going to have a little hearing to see how much he has to pay the county for his legal services here" (emphasis added). It is clear from these statements that a judge, prejudiced against the defendant, was permitted to assess attorney's fees.

III. 987.8 OF THE PENAL CODE DENIES DUE PROCESS IN THAT IT IS OVERLY VAGUE.

No standards or guidelines are set for determining the ability of the accused to pay or for determining the

cost of counsel. Without standards, the statute should fall as did a Pennsylvania statute assessing court costs in criminal cases, Giacco v. State of Pennsylvania, supra. The problem with a lack of standards is clearly evident in petitioner's matter, where it is impossible to determine petitioner's present ability to pay or to understand what method was used to determine the value of legal services. The judge was permitted to exercise unfettered discretion.

IV. DENIAL OF THE RIGHT TO A TRIAL BY JURY DENIES EQUAL PROTECTION AND DUE PROCESS OF LAW.

In California, an attorney's client has a right to have a jury of his peers settle contested issues as to the value of services performed by the attorney and billed to the client, Cassel v. Gregori, 28 Cal.App.2d Supp.796 (1937). All persons have such a right except indigent defendants, People v. Amor, 12 Cal.3d 20 (1974). Indigents are

required to appear before a judge who is to determine the amount owed to the governmental body that effects the judge's salary and working conditions. There is, of course, no limit as to the amount the judge can assess.

None of the above issues were considered in Fuller v. Oregon, ___ U.S. ___, 40 L.Ed.2d 642, 94 S.Ct.2116 (1974).

CONCLUSION

For the foregoing reasons, petitioner prays that a Writ of Certiorari issue to review the decision of the California Court of Appeals in this case.

Respectfully submitted,

Herbert M. Barish

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